

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

RICHARD C. DEVINE,

Plaintiff,

v.

Civil Action No. 5:06CV136
(STAMP)

MICHAEL J. ASTRUE,¹
Commissioner of
Social Security,

Defendant.

MEMORANDUM OPINION AND ORDER
AFFIRMING AND ADOPTING REPORT AND
RECOMMENDATION OF MAGISTRATE JUDGE

I. Procedural History

The plaintiff, Richard C. Devine, filed an application on December 3, 1996 for Supplemental Security Income ("SSI") and Disability Insurance Benefits ("DIB") under Titles XVI and II, respectively, of the Social Security Act, 42 U.S.C. §§ 1381-1383f, 401-433. In the application, the plaintiff alleged disability since March 31, 1996, due to heart, vision, and memory problems and Post Traumatic Stress Disorder ("PTSD").

The state agency denied the plaintiff's application initially and on reconsideration. Administrative Law Judge ("ALJ") Frederick Moncrieff issued an unfavorable decision to the plaintiff on July 31, 1998. The Appeals Council remanded the plaintiff's claim to

¹On February 12, 2007, Michael J. Astrue became the Commissioner of Social Security. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Michael J. Astrue is automatically substituted as the defendant in this action.

the ALJ for a new hearing and decision specifically addressing the plaintiff's mental impairments and residual functional capacity ("RFC") with testimony of a Vocational Expert. A new hearing before ALJ Barry Anderson was held on October 30, 2001. The plaintiff, represented by counsel, testified on his own behalf. The plaintiff's wife and Vocational Expert ("VE") Timothy Mahler also testified at the hearing. On November 27, 2001, ALJ Anderson issued a decision finding that the plaintiff was not disabled. The Appeals Council denied the plaintiff's request for review, and the plaintiff appealed to the district court.

United States Magistrate Judge Kaull issued a report and recommendation on November 3, 2004, which United States District Judge Robert E. Maxwell affirmed and adopted, remanding the case to the Commissioner for further proceedings in accordance with the report and recommendation. Upon remand, a hearing was held by ALJ Karl Alexander. ALJ Alexander issued an unfavorable decision to the plaintiff on July 5, 2006.

The Appeals Council denied the plaintiff's request for review, rendering the ALJ's decision the final decision of the Commissioner. Thereafter, the plaintiff filed the present action pursuant to 42 U.S.C. § 405(g) seeking judicial review of an adverse decision by the defendant, Commissioner of Social Security.

The case was referred to United States Magistrate Judge John S. Kaull for submission of proposed findings of fact and

recommendation for disposition pursuant to 28 U.S.C. § 636(b)(1)(B). The parties filed cross motions for summary judgment. Magistrate Judge Kaull considered the plaintiff's and the defendant's motions for summary judgment and submitted a report and recommendation. In his report, the magistrate judge recommended that the defendant's motion for summary judgment be granted and the plaintiff's motion for summary judgment be denied.

Upon submitting his report, Magistrate Judge Kaull informed the parties that if they objected to any portion of his proposed findings of fact and recommendation for disposition, they must file written objections within ten days after being served with a copy of the report. To date, no objections have been filed.

II. Standard of Review

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court is required to make a de novo review of those portions of the magistrate judge's findings to which objection is made. However, failure to file objections to the magistrate judge's proposed findings and recommendation permits the district court to review the recommendation under the standards that the district court believes are appropriate and, under these circumstances, the parties' right to de novo review is waived. See Webb v. Califano, 468 F. Supp. 825 (E.D. Cal. 1979). Because no objections have been filed, this Court reviews the report and recommendation of the magistrate judge for clear error.

III. Discussion

In his motion for summary judgment, the plaintiff argues that: (1) the ALJ failed to give sufficient weight to the opinions of his treating physicians; (2) the ALJ failed to evaluate his subjective complaints; and (3) the Commissioner failed to effectuate the intent of the January 27, 2005 order of the district court remanding his claim. The Commissioner contends that the plaintiff's arguments are without merit.

An ALJ's findings will be upheld if supported by substantial evidence. See Milburn Colliery Co. v. Hicks, 138 F.3d 524, 528 (4th Cir. 1998). Substantial evidence is that which a "reasonable mind might accept as adequate to support a conclusion." Hays v. Sullivan, 907 F.2d 1453, 1456 (4th Cir. 1990)(quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)). Further, the "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." Sec'y of Labor v. Mutual Mining, Inc., 80 F.3d 110, 113 (4th Cir. 1996)(quoting Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620 (1966)).

Following review of Magistrate Judge Kaull's unopposed report and recommendation, the parties' motions for summary judgment, and the extensive record in this case, this Court agrees that substantial evidence supports ALJ Alexander's decision that the plaintiff was not disabled through the date of his decision.

Accordingly, this Court finds no clear error in the recommendation of the magistrate judge.

IV. Conclusion

Because the parties have not objected to the proposed findings of fact and recommendation for disposition, and because this Court finds that the recommendation is not clearly erroneous, this Court hereby AFFIRMS and ADOPTS the magistrate judge's report and recommendation in its entirety. For the reasons stated above, it is ORDERED that the defendant's motion for summary judgment be GRANTED and that the plaintiff's motion for summary judgment be DENIED. It is further ORDERED that this case be DISMISSED and STRICKEN from the active docket of this Court.

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit a copy of this memorandum opinion and order to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: March 24, 2008

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE